COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

GRACE KIM, Plaintiff, Cross-Defendant, and Appellant, v. DONALD TAYLOR and SUSAN TAYLOR, Defendants, Cross-Complainants, and Respondents.	4 CIVIL 25071 (Super.Ct.No. CW9214) O P I N I O N

APPEAL from a judgment of the Superior Court of San Bernardino County. Fenton E. Jones, Judge.* Affirmed.

Robert Arnold for Plaintiff, Cross-Defendant and Appellant.

Covington & Crowe for Defendants, Cross-Complainants and Respondents.

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*Retired judge of the municipal court sitting under assignment by the Chairperson of the Judicial Council.

THE COURT

As the result of a hostile encounter between adjoining homeowners, plaintiff Grace Kim sued defendants Donald and Susan Taylor seeking damages and injunctive relief for an alleged battery, invasion of privacy, and infliction of emotional distress. Defendants cross-complained against plaintiff and Jason Kim, plaintiff's husband, seeking damages and injunctive relief for an alleged encroachment. After a nonjury trial, during which the parties stipulated to entry of mutual restraining orders, the court decided to deny all other relief on both the complaint and the cross-complaint. Plaintiff appeals from the resulting judgment, except that portion of the judgment denying relief on the cross-complaint.

In accordance with established principles of appellate review, we shall summarize the facts by viewing the evi-

dence in the light most favorable to the parties prevailing below, resolving all conflicts in their favor and indulging in all reasonable inferences favorable to the judgment. (Aceves v. Regal Pale Brewing Co. (1979) 24 Cal.3d 502, 507.)

Donald and Susan Taylor purchased a new tract home on Coolcrest Avenue in Upland. Before moving in, Donald approached their neighbors to the north, Jason and Grace Kim, to discuss the possibility of sharing the cost of building a block wall on their mutual property line. Jason indicated a willingness to share expenses but never committed himself. He was frequently away on business trips.

When the Taylors moved into their new home nothing had been settled about the wall. Donald Taylor was becoming concerned because a swimming pool was under construction in his yard but city

authorities would not permit its completion until the area was fenced. Donald Taylor approached Grace Kim as she was walking in her yard. She told Donald her husband was away on business. Her aloof manner angered Donald, who called her a snob. Jason Kim learned of the conversation and refused to discuss the wall until Donald apologized. Donald sent an apology letter, though he did not think he had anything to apologize for, but the wording was unsatisfactory to the Kims. The Taylors then constructed a grapestake fence at their own expense. This fence was built on the Taylor's property, parallel to and 18 inches from the common property line with the Kims. The Kims constructed two block walls perpendicular to the grapestake fence. One wall ran along the rear boundary of the Kim's property and the other projected out from the Kim's house or garage. The walls stopped at the property line,

18 inches from the grapestake fence.

About 11 a.m. on March 1, 1975, Donald Taylor, looking out a rear window of his house, noticed a piece of 2 x 4 lumber leaning against his grapestake fence. He went outside and, observing Grace Kim in her back yard, asked her to remove the lumber from his fence. She told him to remove it himself. Donald went out a gate at the rear of his property and proceeded to the back corner of the grapestake fence. He observed that the 18-inch gaps between the grapestake fence and the beginnings of the two block walls had been closed by temporary barriers consisting of plywood braced with a plastic trash can and a diagonal 2 x 4 about 12 feet long. Removing the barrier closest to him, he slid the plywood back against the block wall and moved the 2 x 4 and the trash can across onto the Kims' property. He started to walk along the 18-inch strip to remove the other

temporary barrier when Grace Kim stepped into his path and told him to get off her property. Donald replied that he was on his own property.

In the meanwhile, Susan Taylor had gone out her front door and approached the second temporary barrier from the front side. She now called out: "Get off our property, you Jap." At these words, Grace Kim turned around and Donald Taylor walked past her and joined his wife. They removed the second temporary barrier and returned to their house.

A short time later, Grace Kim telephoned a neighbor, Sharon Smith, and recounted the incident. Grace Kim said something about Susan Taylor "pushing" her and Sharon asked: "You mean she hit you?" Grace answered: "No. I wish she had. Then I could sue."

In April 1975, Grace Kim commenced the present action. Her version of the encounter was that she agreed to remove

the temporary barriers and while doing so Susan Taylor snuck up behind her and hit her in the middle of the back with an 18-inch length of 2 x 4.

During the course of the trial, the parties stipulated to entry of "comprehensive" and "permanent mutual restraining orders against all parties to the Action." After the court had announced its intended decision in favor of defendants on the complaint, plaintiff's counsel was directed to prepare the injunction order. Defendants objected to the order drafted by plaintiff's counsel and were directed by the court to draft an alternative. The court accepted the defendants' version and judgment was entered accordingly. No findings were requested or made.

On appeal, plaintiff contends (1) the decision is not supported by substantial evidence, (2) the court erred in admitting the testimony of Sharon Smith

regarding her telephone conversation with plaintiff, and (3) the revision of the injunction provisions violated the stipulation and was an abuse of discretion.

I

Dr. Elmer Thomassen, an orthopedic surgeon, testified as a witness for plaintiff. He examined plaintiff on March 21, 1975, three weeks after the encounter with defendants. He diagnosed a contusion of the lower dorsal spine. There was no discoloration of the skin or other sign of recent trauma. An X-ray revealed no abnormalities. The contusion could have been caused by a blow or by a fall or by lifting a heavy object. Dr. Thomassen prescribed medication to reduce swelling and relax the muscles. Plaintiff was seen several times during the ensuing three years, reporting continued pain and tenderness.

Plaintiff contends this expert testimony entitles her as a matter of law to a

judgment in her favor on the cause of action for battery. She argues that causation of illness is a subject not within the competence of a trial judge or lay juror so that an expert medical opinion on such an issue is necessary and conclusive if not rebutted by other expert testimony. Because defendants did not call an expert witness to contradict Dr. Thomassen, plaintiff maintains that his testimony is conclusive proof that she was struck on the back with a 2 x 4 by Susan Taylor.

Plaintiff's position is not well taken. Assuming for the sake of argument that Dr. Thomassen's testimony was conclusive as to all matters within the scope of his expertise, the testimony established only that plaintiff suffered from a back injury three weeks after the encounter with defendants that could have been caused by a blow, a fall, or lifting a heavy object. Dr. Thomassen did not even

venture an opinion as to when the injury might have occurred. Whether the injury was caused by a blow from Susan Taylor was an entirely separate factual question which could not be conclusively proven by medical diagnosis and which was the subject of sharply conflicting testimony. 1/ Resolution of this conflicting testimony was the task of the trial judge acting as trier of fact in the absence of a jury. On the record before us, the trial judge's determination may not be disturbed.

II

Next, plaintiff contends that the court erred in admitting Sharon Smith's testimony about the telephone conversation

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1/ There was evidence that plaintiff had consulted doctors about a back problem in 1969-1970. Also, Sharon Smith testified that plaintiff had complained to her of back pain before the March 1 incident. Thus the trier of fact could infer that plaintiff used her preexisting back problem as the basis of a false accusation against Susan Taylor.

during which she asked plaintiff whether Susan Taylor struck her and plaintiff replied that she wished Susan Taylor had struck her so she could sue. Plaintiff made a timely objection at trial to this evidence on hearsay grounds. Defendants replied that it was admissible as an admission by a party opponent, a declaration against interest, or a spontaneous declaration. The trial court overruled the objection without indicating the basis of the ruling.

Plaintiff maintains that the testimony did not qualify as the admission of a party opponent because it included an incompetent legal opinion about the requirements for a tort action. The argument is preposterous.

The first step in analyzing a heresay problem is determining the relevancy of offered evidence. (Kessler v. Gray (1978) 77 Cal.App.3d 284,291.) Here the evidence was not offered as a legal opinion nor was

it so considered by the trial court. It was offered to prove (1) that plaintiff was not struck by Susan Taylor, a historical fact of obvious relevance, and (2) that plaintiff wished she had been struck so that she could sue, evidence of plaintiff's state of mind relevant to show that the accusation was probably fabricated because of plaintiff's desire for revenge by litigation. The testimony was properly admitted for these purposes under Evidence Code sections 1220 and 1250. 2/

2/ Evidence Code section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

III

During the testimony of Jason Kim, plaintiff's husband, plaintiff's counsel asked what problems he had experienced with defendants. Cousel for defendants objected to this line of inquiry on relevancy grounds, stating that if the evidence was offered to support the request for injunctive relief defendant would stipulate to entry of permanent mutual restraining orders. Plaintiff's

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(Fn. 2 cont.)
Evidence Code Section 1250 provides:
"(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
"(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
"(2) The evidence is offered to prove or explain acts or conduct of the declarant.
"(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

counsel agreed to join the stipulation provided the restraining orders be "as comprehensive as each of us can conceive." The court inquired whether defendants would agree to an injunction in terms "as comprehensive as he [plaintiff's counsel] wishes, as long as it's mutual?" Defendants' counsel replied in the affirmative and plaintiff's counsel abandoned that line of inquiry.

After trial, plaintiff's counsel submitted a proposed injunction which appeared to be directed solely against defendants except that at the end was a statement that the provisions of the injunction were mutual. Defendants objected that this proposed order appeared to assign more blame to them and therefore was not truly mutual. The trial court agreed and accepted an alternative order prepared by defendants' counsel. In addition to its neutral format, the

alternative differed from plaintiff's version in several respects, which we will mention later. The parties are agreed that there was a valid stipulation; they disagree about the scope and meaning they assign to its terms.

"Stipulations must be given a reasonable construction with a view to giving effect to the intent of the parties and 'the language used will not be so construed as to give it the effect of an admission of a fact obviously intended to be controverted, ...' [Citations.]" (Palmer v. City of Long Beach (1948) 33 Cal.2d 134,144.) "A stipulation of counsel, like other agreements, must be construed by an objective standard. It is immaterial that one of the parties had an undisclosed intention of belief as to what it meant." (Consolidated Dock & Storage Co. v. Superior Court (1971) 18 Cal.App.3d 949, 952.)

Plaintiff contends, first, that she

was entitled to an injunction in the format she proposed, drawn in her favor and against the defendants but with a provision for mutuality tacked on at the end like an afterthought. In support of this proposition, she argues (1) defendants did not seek this kind of injunctive relief in their cross-complaint 3/ whereas she had requested it in her complaint, (2) the provision for mutuality was merely the result of a technical legal requirement unrelated to the merits of the action ("Obviously, it is only out of mechanical deference to the vernerable principle that injunctive relief be mutual that Appellant and her husband find themselves the objects of injunctive provisions herein"), and (3) the evidence at trial, had it been admitted, would have shown that

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3/ The cross-complaint sought injunctive relief only against an alleged encroachment by the Kims' block wall.

defendants were guilty of numerous acts of hostility toward plaintiff and her husband.

None of these arguments can withstand scrutiny. There is no legal requirement for mutuality in an injunction; plaintiff waived her right to object on the ground that the relief was outside the scope of the cross-complaint by accepting the stipulation for a mutual injuction; and, finally, we cannot indulge in speculation about what the evidence might have shown had the parties not stipulated to the mutual injunction.

As we view it, the question is one of interpretation. The two requirements mentioned in the stipulation were that the objective meaning of mutuality in this context required that the injunction be drawn in a neutral fashion which did not imply that any party was more at fault than any other party. Consequently the trial court was correct in rejecting the

format of plaintiff's proposal and accepting instead defendant's alternative.

Next, plaintiff complains that the words "disturb" and "threaten" were dropped from a provision forbidding acts which "harass, molest, annoy, disturb, threaten, assault, batter, touch, direct obscene gestures toward, or utter racial slurs to, the other parties hereto."

This provision is a fine example of the old legal custom of carrying redundancy to absurd lengths. We can conceive of no conduct, nor has plainiff suggested any, which would qualify as a threatening or disturbing act without at the same time being a harassing, annoying, or molesting act. Thus the terms were properly deleted as surplusage.

Plaintiff's proposed order prohibited defendants from engaging in any of the proscribed conduct indirectly through the agency of third parties and stated

that such parties would "include, without limitation, spouse, friends, family, relatives, employees, agents, servants, corporations and neighbors, the last category including, without limitation, Jerry Smith, Michael Smith, Sharon Smith, David Krause, and Connie Krause."4/ The injunction as signed by the court prohibited all parties from "directly or indirectly conspiring, petitioning, importuning, requesting or otherwise causing third parties to effect the proscribed conduct set forth...above."

Plaintiff agrues merely that the "specificity of the provision" in her proposed version "facilitates future enforcement of the order." We disagree. The specification of abstract categories such as friends and employees is

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4/ Connie Krause, like Sharon Smith, testified as a witness for defendants. The other named individuals are evidently spouses or close relatives of the two witnesses.

completely unnecessary inasmuch as the parties are prohibited from effecting the proscribed conduct through any third party. The naming of individuals is unnecessary for the same reason and is also inconsistent with the mutuality requirement because it singles out people who have apparently been allied more closely with defendants than with plaintiff.

Plaintiff's version of the injunction included a provision restraining defendants from engaging in any of the proscribed conduct against plaintiff's "spouse, family, friends, relatives, employees, servants, or associates." This provision was omitted from the judgment. Plaintiff contends that absence of this provision "results in a failure to adequately safeguard the persons potentially endangered by Respondents' conduct."

As previously mentioned, the

stipulation required only that the terms of the injunction be comprehensive and mutual. The trial court could reasonably conclude that this proposed provision violated the mutuality requirement because these third parties -- relatives, friends, servants, etc. -- were not before the court and could not be enjoined from engaging in any of the proscribed conduct. Also, the requirement that the injunction be comprehensive obviously carried certain implied limitations. This was not an invitation to counsel to give free reign to his imagination, permitting him to enjoin, for example, swimming during the month of July or eating fish on Tuesdays. Clearly the term "comprehensive" referred to the issues raised by the pleadings or at trial. Even with this implied limitation, the scope of the injunction remained imprecise, to say the least, and the trial judge was required to exercise his discretion to select its

provisions. As there was nothing alleged in the pleadings or discussed at trial about hostile acts directed at third parties, the trial court's deletion of this provision was not an abuse of discretion.

The trial court also eliminated a provision prohibiting the parties from misrepresenting the outcome of the action. Again, this was an issue not explicitly addressed in the pleadings or at trial, and its deletion was not an abuse of discretion.

We conclude that the injunction granted by the court was consistent with the terms of the stipulation and there was no abuse of the trial court's discretion.

The portions of the judgment appealed from are affirmed.

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

COURT OF APPEAL - FOURTH DIST.

FILED

DEC 28 1981

ROBERT L. FORD, Clerk

GRACE KIM, Plaintiff, Cross-Defendant, and Appellant, v. DONALD TAYLOR and SUSAN TAYLOR, Defendants, Cross-Complainants, and Respondents.	4 CIVIL 25071 (Super.Ct.No. CW9214) RULING IN RE PETITION FOR REHEARING

THE COURT:

The petition for rehearing is DENIED.

Morris, J.

Acting Presiding Justice

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

GRACE KIM, et al.

Plaintiff, Cross-defendants,
and Appellants,

vs.

DONALD TAYLOR and SUSAN TAYLOR,

Defendants, Cross-complainants,
and Respondents.

RULING IN RE PETITION FOR HEARING

CW 9214
4 CIV 25071

(Postal-card ruling attached
as next sheet)

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

I have this day filed Order HEARING DENIED (Feb. 3, 1982)

In re: 4 Civ. No. 25071
Grace Kim

vs.
Donald Taylor and Susan Taylor

Respectfully,

Clerk

(COVINGTON & CROWE
Pleading Paper
Letterhead)

FILED: JULY 14, 1980

Attorneys for Defendants
and Cross-Complainants

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN BERNARDINO

GRACE KIM, Plaintiff, vs. DONALD TAYLOR, etc., et al., Defendants.	CASE NO. CW 9214 JUDGMENT AFTER TRIAL BY COURT
DONALD TAYLOR and SUSAN TAYLOR, Cross-Complainants, vs. GRACE KIM, et al., Cross-Defendants.	

This cause came on regularly for trial on April 23 and 24, 1980, in Department 4-ONT of the above entitled court, the Honorable Fenton E. Jones, Judge Presiding; Plaintiff and Cross-Defendants appearing by Robert Arnold, and Defendants and Cross-Complainants appearing by Robert F. Schauer of Covington & Crowe; and evidence both oral and documentary having been presented by both parties and the cause having been argued and submitted for decision, and findings of fact and conclusions of law not having been requested;

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff GRACE KIM take nothing by her complaint and that Cross-Complainants DONALD TAYLOR and SUSAN TAYLOR take nothing by their cross-complaint.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all parties bear their own costs and disbursements and arbitration fees in this action.

Pursuant to stipulation made in open court during the trial of this action with further hearing held on July 11, 1980, interpreting the stipulation made during the trial of this action,

IT IS ORDERED, ADJUDGED AND DECREED that GRACE KIM, DONALD TAYLOR, JASON KIM and SUSAN TAYLOR are hereby permanently restrained and enjoined from engaging in any of the following conduct:

1. Trespassing upon the real property of the other parties hereto including, without limitation, causing objects to fall upon such property.

2. Causing damage to the real or personal property of the other parties hereto.

3. Harassing, molesting, annoying, assaulting, battering, touching, directing obscene gestures toward or uttering racial slurs to the other parties hereto.

4. Shouting at, talking to, or otherwise communicating with the other

parties except when a situation where communicating or cooperating is required to thwart some emergency or peril.

5. Invading the privacy of or disturbing the peace of the other parties hereto.

6. Uttering derogatory or disparaging remarks concerning the other parties hereto.

7. Directly or indirectly conspiring, petitioning, importuning, requesting or otherwise causing third parties to effect the proscribed conduct set forth in Items 1 through 6 above.

Dated: July 11, 1980

/s/
FENTON E. JONES
Judge of the
Superior Court

COURT OF APPEAL, FOURTH DISTRICT, DIV. 2

STATE OF CALIFORNIA

GRACE KIM, Plaintiff, vs. DONALD TAYLOR, etc., et al., Defendants.	CASE NO. CW 9214 4 CIVIL 25071 REPORTER'S TRANSCRIPT
DONALD TAYLOR and SUSAN TAYLOR, Cross-Complainants, vs. GRACE KIM, et al., Cross-Defendants.	

Partial Verbatim Transcript as follows:

Q By Mr. Arnold: Mr. Kim, have you had friendly relations with your neighbors, the Taylors?

A I wish I could, but no.

Q When did your problems first begin with the Taylors?

A Since November of 1974.

Q What problem began in November 1974?

MR. SCHAUER: Your Honor, I'm going to object to this whole line of testimony. I don't really see how that's relevant to the issue here, and if it goes to the issue of restraining orders, as I've advised the Court before on this matter, I would be stipulating that the Court can make permanent mutual restraining orders against all parties to the action. If it's for some other purpose, then I don't see the relevancy of it.

THE COURT: Yes, Counsel.

MR. ARNOLD: If Mr. Schauer is stipulating to the necessity of the restraining orders and is also stipulating that they be as comprehensive as each of us can conceive, then I'm prepared to move onto another line of questioning.

MR. SCHAUER: My feeling on that is, one, they are made mutual and, two, that they are restraining orders in the nature of -- I can't think of anything more

comprehensive than an order that says will not threaten, harass or annoy. They don't even have to be contacted, as far as I'm concerned.

THE COURT: Do you accept the stipulation?

MR. ARNOLD: I accept the stipulation provided that -- I can envision a particular kind of prescribed conduct, and I'm willing to make the prescription mutual, then that particular form of conduct can be included in the order. I wouldn't want to run into this situation with Mr. Schauer where a particular provision was necessary and here I was ready to elicit the testimony where it's in fact necessary. As long as we're in a situation of putting our heads together and making it comprehensive, then I think we can dispense with this.

THE COURT: Will you allow him to make it as comprehensive as he wishes, as long as it's mutual?

MR. SCHAUER: That's fine.

MR. ARNOLD: Under those conditions I'll move into another line of questioning.

THE COURT: Thank you. You may proceed.

(Robert Arnold Pleading
Paper and Letterhead)

SUPERIOR COURT, COUNTY OF SAN BERNARDINO

STATE OF CALIFORNIA

GRACE KIM, Plaintiff, Cross-Defendant, and Appellant, v. DONALD TAYLOR and SUSAN TAYLOR, Defendants, Cross-Complainants, and Respondents.	(Super.Ct.No. CW9214) (PROPOSED) ORDER IN RE PERMANENT INJUNCTIONS

The parties hereto having stipulated in open court at the trial of the above-entitled action to the entry of an order in re permanent injunctive relief, and a hearing having been held in a Law and Motion department of said court to clarify such stipulation,

IT IS ORDERED, ADJUDGED, AND DECREED

AS FOLLOWS:

The defendants and cross-complainants herein, DONALD TAYLOR and SUSAN TAYLOR, are hereby permanently restrained and enjoined from engaging in any of the following conduct:

1. Trespass upon the real property of the other parties hereto, including, without limitation, causing objects to fall upon such property.

2. Cause damage to the real property of the other parties hereto.

3. Harass, molest, annoy, threaten, assault, batter, touch, direct obscene gestures toward, or utter racial slurs to, the other parties hereto.

4. Shout at, talk to, or otherwise communicate with the other party, except in a situation where communication or cooperation is

required to thwart some emergency or peril.

5. Invade the privacy of, or disturb the peace of, the other parties hereto.

6. Utter derogatory or disparaging remarks concerning the other parties hereto.

7. Misrepresent to third parties the outcome of the within litigation.

IT IS FURTHER ORDERED that the defendants and cross-complainants, DONALD TAYLOR and SUSAN TAYLOR, are permanently restrained from engaging in the aforementioned proscribed conduct indirectly, by conspiring, petitioning, importuning, requesting, or otherwise causing third parties to effect the proscribed conduct. Such third parties include, without limitation, spouse, friends, family, relatives, employees, agents, servants, corporations,

and neighbors, the last category including, without limitation, Jerry Smith, Michael Smith, Sharon Smith, David Krause, and Connie Krause.

IT IS FURTHER ORDERED that the defendants and cross-complainants, DONALD TAYLOR and SUSAN TAYLOR, are permanently restrained and enjoined from directing the aforementioned conduct against the spouse, family, friends, relatives, employees, servants, or associates of the other parties hereto.

IT IS FURTHER ORDERED that the plaintiffs and cross-defendants herein, GRACE KIM and JASON KIM, are, owing to considerations of mutuality, permanently enjoined and restrained from engaging in any of the acts of conduct enumerated above.

IT IS SO ORDERED.